No. 25368 State of West Virginia v. Stephen W. Hatfield

FILED
Nov. 10, 1999
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, C. J., dissenting:

Factually, the majority opinion contains a number of significant errors. First, it refers to the hearing of December 19, 1996, as a competency proceeding. Such is simply not the case. No competency hearing has ever been held regarding the appellant. It is axiomatic that the conviction of a legally incompetent defendant or the failure of the trial court to provide an adequate competency determination violates due process by depriving the defendant of his constitutional right to a fair trial.

The majority opinion (*Hatfield II*) erroneously states that: ". . . [t]he remand was clearly for a determination on whether the appellant was competent on the date he originally entered his guilty pleas." However, the actual language from the prior panel's summary of the written opinion provides otherwise: ". . .[r]emand is required to enable trial court to make certain inquiries of defendant and ask defendant whether he understood counsel's reasons for opposing guilty plea." *State v. Hatfield*, 186 W.Va. 507, 413 S.E.2d 162 (1991) (*Hatfield I*).

Indeed, had it been the intent of the *Hatfield I* Court to remand for a retrospective competency determination, the Court would have said so. Instead, the Court clearly states that the case was remanded to enable the trial court to make certain inquiries, as provided in Syllabus Point 6 of *Hatfield I*.

Syllabus Point 6 of *Hatfield I* directed that the lower court on remand:

(1) require trial counsel to state on the record, in appellant's presence, reasons for opposing the initial plea of guilty;

(2) ask the appellant to acknowledge on the record whether appellant understands his counsel's statements, and, in view of such statements, whether the appellant persists in his pleas of guilty; and

(3) "[i]f" the [appellant] then states he still desires to plead guilty, the court may accept the plea.

Syllabus Point 6 did not state what specifically should be done "if" the appellant did not persist in his desire to plead guilty. But it was not necessary, in light of the opinion and the judgment order, for the court to do so. It is clear from the prior panel's holding, especially when the opinion and judgment order are read together as a mandate, that the appellant's initial pleas were determined to be invalid, and the appellant was to be permitted the opportunity to plead anew.

The United States Supreme Court has held that where an appellate judgment is silent with respect to the manner in which lower court should proceed on remand from an appellant court, a determination of the scope of the mandate requires a careful reading of the appellant court's opinion because it serves as the statement of reasons upon which the judgment rests and the opinion must read as a whole. *Rogers v. Hill*, 289 U.S. 582, 587, 53 S.Ct. 731, 734, 77 L.Ed. 1385 (1933).

Clearly, if the Court in *Hatfield I* had wanted to require the trial court to conduct a retrospective competency evaluation, it would have done so in the same way that it did in the case cited by the majority, *State v. Cheshire*, 170 W.Va. 217, 292 S.E. 2d 628 (1982). The same is true in a number of cases decided by this Court, the most recent being *State v. Lockhart*, 200 W.Va. 479, 490 S.E.2d 298 (1997) where this Court remanded for a proffer of expert testimony regarding dissociative identity disorder; and in *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995), where the Court remanded for a *Kastigar* hearing.

If *Hatfield I* had intended remand for the purpose of more fully developed competency evidence, as stated in *Hatfield II*, even then the lower court failed to follow that directive as well. In spite of additional evidence presented upon remand that the appellant was not competent on February 27, 1989 -- as testified to by his trial counsel at the December 19, 1996 hearing -- the circuit court found that he was competent.

The additional evidence before the lower court upon remand regarding competency at the time of the initial 1989 pleas was based on statements of psychiatrist Johnnie Gallemore, M.D. Attorneys Ray Hampton and Lafe Chafin testified that Dr. Gallemore had reported to them that on the very morning of the plea, having had direct contact with the appellant, that it was Gallemore's opinion that the appellant's choice to plead guilty to the charges against him was significantly affected by his illness, and that he lacked the capacity on February 27, 1989, to intelligently and knowingly enter a plea of guilty.

It is clear that *Hatfield I* did not remand for the purpose of a retrospective competency determination and, even if it did, the trial court made its competency finding based only upon *prima facie* evidence the appellant was not competent.

Notwithstanding the fact that no retrospective competency determination was part of the remand, the majority opinion makes much of the alleged fact that the appellant refused to participate in the retrospective competency evaluation scheduled by the circuit court. The parties agreed upon remand to a determination of appellant's current competence in 1996. The circuit judge, *sua sponte*, added the question of appellant's competence in 1989, and to that appellant objected. In a letter to the court, prepared and entered by counsel, the appellant declined to participate in a retrospective evaluation. The court was informed prior to the December 19, 1996 hearing that the defendant would, in fact, participate in a contemporaneous competency evaluation, and the circuit court declined to have same done.

The majority opinion also characterizes the testimony of the appellant's trial counsel, Lafe Chafin and Ray Hampton as argument, when the record clearly shows that, in strict compliance with the directive in *Hatfield I*, Messrs. Chafin and Hampton testified under oath as to their reasons for opposing appellant's desire to enter pleas of guilty. Their testimony was evidence, not argument.

The majority opinion also states that the sole issue before the court was whether *Hatfield I* vacated and reversed appellant's conviction, or simply ordered the circuit court to reconsider appellant's guilty pleas in light of further evidence. Assuming, *arguendo*,

that the court's seemingly unambiguous judgment order, which "set aside, reversed and annulled" the appellant's convictions was "simply incorrect," the language of the opinion in *Hatfield I* makes it clear that the court determined the plea colloquy to be incomplete, and as a consequence the conviction was constitutionally infirm.

The majority opinion states in a footnote that the judgment order in *Hatfield I* which "set aside, reversed and annulled" the conviction was "simply incorrect." However, this Court has before it an affidavit from former Justice Richard Neely, supportive of both appellant's position on the meaning of the opinion and that the judgment order was written.[1]

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[1] AFFIDAVIT

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, TO WIT:

Richard Neely, having been duly sworn, states and deposes as follows:

1. I am a practicing attorney licensed to practice in the State of West Virginia and I am a former member of the West Virginia Supreme Court of Appeals.

2. In my capacity of a justice of the West Virginia Supreme Court of Appeals, I participated in hearing the case of State v. Hatfield, as reported at 186 W.Va. 507 (1991) (hereinafter Hatfield I).

3. At the request of Thomas W. Smith, counsel for Stephen W. Hatfield, I have been asked to present my understanding of the court's decision and intentions in State v. Hatfield, supra, which are as follows, herein.

4. My review of the decision and the order require me respectfully to disagree with the representations contained in the slip opinion in State v. Hatfield, No. 25368 (hereinafter Hatfield II), released July 16, 1999, as to the intention of the unanimous court in remanding the matter to the circuit court.

5. Given the issues raised and the facts presented in Hatfield I, it was the intention of the court to remand the matter for further development of the record in the areas of the bases for trial counsels' objections to Mr. Hatfield's pleas, Mr. Hatfield's on-the-record acknowledgment of the objections and, then after considering the same, to determine whether he wished to enter a plea of guilty. This is all contained in syllabus point 6 of Hatfield I.

6. The holding of the court was that on the facts presented the plea colloquy was insufficient and that only after trial counsel was heard from and Mr. Hatfield was queried

(continued...)

The majority opinion also omits the last sentence of footnote 13 of *Hatfield I*. There, the *Hatfield I* Court concludes its ruling on the factual basis and the motion to continue issues by stating: ". . .[t]here is obviously no prejudice in this regard in light of our remand."

Notwithstanding the clear language of the mandate by the unanimous court in *Hatfield I* (that case was set aside, reversed and annulled) the majority opinion points to two excerpts from the *Hatfield I* opinion in support of its premise that "it is patently clear" that

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[1](...continued)
about his understanding of counsels' objections could the circuit court accept a guilty plea from Mr. Hatfield if it was then still his desire to plead guilty.

7. Under the decision, if Mr. Hatfield had opted to persist in his plea of guilty, the court could have accepted the plea after a full and fair colloquy. However, it was my intention that if Mr. Hatfield declined to plead guilty the counts would be tried.

8. The Hatfield II opinion states that the fact that the Hatfield I court ruled on the sufficiency of the factual basis issue supports the conclusion that it was never the intention of the Hatfield I court to vacate or set aside the conviction. Such is not the case. First, Mr. Hatfield raised the issue of sufficiency on appeal, so that issue was ripe for resolution. Second, had Mr. Hatfield opted to persist in his plea of guilty after the court's directives had been complied with, the question of sufficiency of the factual basis would have been helpful to the circuit court in making an appropriate record.

9. The court's opinion in Hatfield II states in a footnote that the judgment order in the case which "set aside, reversed and annulled" Mr. Hatfield's conviction was a mistake. I would respectfully disagree and note that the judgment order is consistent with the opinion and that, had a majority of the court opted to affirm the convictions, I would have dissented.

FURTHER THE DEPONENT SAITH NAUGHT.

_____
Richard Neely

Taken, subscribed and sworn to before me in my said County and State this the 27 day of August, 1999.

_____
Notary Public

My Commission expires November 29, 2005.

the *Hatfield I* court did not vacate, set aside or otherwise give the appellant an opportunity to withdraw his pleas:

> Our review of the record in this case indicate that the inquiry of the appellant by the circuit court, under the circumstances of most cases, would be adequate to satisfy the requirements to insure protections of a defendant's constitutional rights. However, in this case, there is an overlay to the proceedings in the circuit court which, if not explored further by the court, may result in severe prejudice to the appellant. This includes: (1) the second suicide attempt by the appellant; and, (2) the appellant's plea of guilty against the advice of counsel.

186 W.Va. at 512, 413 S.E.2d at 161 (emphasis added).

> The appellant also contends that there was an insufficient factual basis to support the guilty plea which was accepted by the circuit court. Although this case is remanded for further determination with respect to whether the guilty pleas was properly taken due to the questions of competency, we believe that the factual basis supports acceptance of the guilty plea inasmuch as the allegations, if taken as true, are sufficient to support the convictions therefor.

186 W.Va. at 514, 413 S.E.2d at 169 (emphasis added).

However, when read in entirety, the *Hatfield I* opinion reveals that this Court "found error" in the plea taking procedures by the trial court, due to questions of competency for two major reasons: (1) the appellant's second suicide attempt (after the lower court's finding of competency to stand trial); and (2) the appellant's desire to plead guilty *against the strident advice of counsel*. Accordingly, the *Hatfield I* court, in its judgment order, set aside, reversed and annulled the pleas and remanded (in its opinion at Syllabus Point 6) to "explore further," whether the appellant, after hearing the objections of his counsel and

acknowledging that he understood them, still wished to persist in his earlier desire to plead guilty.

Hatfield I thus determined that the appellant could suffer "severe prejudice" because statutory and constitutional standards for plea taking were violated by the trial court's failure to conduct a hearing regarding the "second suicide attempt," and the trial court's "failure to place on the record appellant's statement and acknowledgment as to his pleas against counsel advice."

For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice McGraw joins in this dissent.